In The

Supreme Court of the United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners.

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, EDGAR FERRELL, FRANK ALICIA, TOM WILLIAMS, DANNY SCIBIUZZO and NICHOLAS TALLERICO,
Petitioners,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTION PRESENTED

Whether New York City Local Law No. 9 of 1987 (otherwise known as the "SRO Moratorium"), which compels owners of buildings to rent vacant units to people who have no present possessory or legal interests to the building (thereby depriving owners of their most basic property rights - - the right to possess, use and dispossess of it) constitutes a taking in violation of the Fifth Amendment of the United States Constitution.

IDENTITY OF RESPONDENTS

The following is a list of all the affiliates of Sutton East Associates-86 and The Channel Club:

Sutton East Associates
Sutton East Associates-88
Daed Realty Corporation
150 East 35th Street Associates
Ledemis Realty Corporation

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STATEMENT OF THE CASE

A. THE NATURE OF LOCAL LAW NO. 9

Single room occupancy ("SRO") residential property in New York City is subject to rent regulation under the New

York City Rent Control and Stabilization Laws. Under these laws, the owner is not required to rent vacant units. Buildings which become vacant can be demolished, subject to compliance with other State and City laws, and the underlying land may be put to other permitted uses.

The SRO Moratorium Law (Local Law No. 9), which was declared invalid by the New York State Court of Appeals, imposed a unique set of restrictions solely for SRO buildings. Those restrictions may be summarized as follows:

> 1. No unit is permitted to remain vacant: If, for any reason, a unit ceases to be occupied, it must be re-rented to persons who have no present possessory or legal interests at controlled rents (R. 48)[1]
>
> 2. Vacant buildings formerly devoted to SRO use may not be demolished or converted to any other use (R. 42 - 43).
>
> 3. To obtain a release of a SRO building from the restrictions of Local Law No. 9, the owner must either:
>
> (a) Pay $ 45,000.00 per unit to the City (the "buyout" provision) (R. 153 - 155), or

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1 The citations preceded by "A." refer to the Appendix to the Petition for Writ of Certiorari which was submitted by petitioner City of New York.

"R." refers to the pages of the Record on Appeal used at the Appellate Division.

"SR." refers to the Supplemental Record in the Court of Appeals.

> (b) Construct or otherwise create replacement housing subject to the same legal requirements (the "replacement" provision) (R. 153 - 155).
>
> The amount of the buyout or the number of replacement units may be reduced if the owner obtains a "hardship" exemption. The exemption applies to an owner who is unable to obtain a net annual return on the building of at least 8 1/2% of the building's value assessed as a SRO residence (R. 155).

In sum, Local Law No. 9 imposes an affirmative mandatory directive to rent all vacant rooms, at controlled rents, to strangers who have no present legal or possessory interest. Once they become tenants, they are then protected from eviction by the New York City Rent Stabilization Law (N.Y.C. Admin. Code § 26-501, *et seq.*) and may stay indefinitely at legally regulated rents. Additionally, Local Law No. 9 requires that respondents Sutton East Associates - 86 and the Channel Club (collectively "Sutton East") be in a business (*i.e.*, renting SRO units) that they are not in and do not wish to be in.

On July 6, 1989, the New York Court of Appeals held that Local Law No. 9 "takes" property without affording owners just compensation, in violation of the New York State Constitution and the United States Constitution.

B. . STATEMENT OF FACTS

In January 1985, Sutton East purchased, for substantial consideration, the property and building known as the Gracie Square Hotel (the "Hotel") located at 451 East 86th Street, New York, New York (SR. 340).

In April 1985, Sutton East purchased, again for substantial consideration, a series of parcels adjacent to the Hotel (SR. 340). Sutton East demolished the structures existing on the adjacent parcels and constructed a new residential condominium building (SR. 340). Channel Club is the owner and sponsor of that condominium building which is known as The Channel Club (SR. 339.).

At the time that Sutton East purchased the Hotel, it was operated as a residential hotel containing thirty-one SRO units. At the time that Sutton East purchased the Hotel, many of the units were vacant and had been vacant for as long as several years (SR. 341).

The Hotel is now completely vacant and has been vacant since October, 1986 (which is before Local Law No. 9 was enacted).

The income that Sutton East could derive from the rental of the SRO units in the Hotel would be grossly insufficient to provide Sutton East with an adequate return for the cost of acquisition and cost of maintenance of the Hotel (SR. 341 - 342). Indeed, any economically feasible development of the Hotel would necessitate major renovation or demolition of the building (SR. 341 - 342).

Accordingly, Sutton East never intended to offer the vacant SRO units for occupancy or to continue the tenancy of any persons residing at the Hotel except as required by the then applicable provisions of law (SR. 342).

Rather, Sutton East acquired the Hotel in order to develop the property (SR. 340 - 341). Sutton East did not buy the property so it could build a new luxury high-rise residential condominium building that would be adjacent to a dilapidated SRO. Sutton East also entered into an agreement with Channel Club granting Channel Club a permanent easement permitting Channel Club to incorporate two of the rear units on the first floor of the Hotel into the lobby of the condominium building (SR. 351).

After Sutton East purchased the Hotel, Sutton East entered into written agreements with the remaining eleven tenants occupying the units at the Hotel (SR. 316, 341). In consideration for substantial sums of money, each of the tenants voluntarily vacated and surrendered possession of their units and swore in an affidavit that Sutton East had not harassed the tenants, used force, interrupted or discontinued services or engaged in any other activity that would have the effect of obtaining vacant possession of a unit by anything other than a voluntary surrender of possession (SR. 316, 341).

Moreover, the New York City Department of Housing Preservation and Development issued, on August 25, 1987, a certification pursuant to New York City Administrative Code § 27 - 198 that there had been no harassment at the Hotel for a prescribed thirty-six month period.

SUMMARY OF REASONS FOR DENYING THE WRITS

A writ of certiorari should be denied because this Court lacks jurisdiction to review the decision of the New York State Court of Appeals. The decision of the New York State Court of Appeals rests upon an independent and adequate state ground -- namely, the interpretation of the "takings" provision of the New York State Constitution (Article I, Section 7). That section provides that "[p]rivate property shall not be taken for public use without just compensation."

Even if this Court determines that there was no independent and adequate state ground, this Court should nonetheless deny the writs of certiorari because the New York State Court of Appeals determined that Local Law No. 9 did not substantially advance a legitimate state interest. All of the petitioners concede that, under this Court's decisions, a statute does not affect a taking if, *inter alia*, it substantially advances a legitimate state interest. The New York State Court of Appeals made a uniquely state factual determination that the local law did not substantially advance a legitimate state interest. This Court should defer to such a negative finding by a state court.

The writs of certiorari should also be denied because this case does not raise unique questions of law nor is the decision of the Court of Appeals at variance with this Court's decisions. At issue is whether the "anti-warehousing" provision of Local Law No. 9 (*i.e.*, the provision which compels an owner

to rent a vacant unit and thereby create a landlord-tenant relationship with a third-party stranger) constitutes a taking.

The Court of Appeals held that:

> "... Local Law No. 9 has effected a *per se* physical taking because it 'interfere[s] so drastically' with the SRO property owners fundamental rights to possess and to exclude." (citations omitted)

(A. 28)

The decision of the Court of Appeals adheres to the consistent line of decisions of this Court which hold that when there is a physical trespass onto, and physical occupation of, private property as a result of government action, there is a "physical" taking.

Petitioner, the Coalition for the Homeless (the "Coalition") is incorrect in asserting that this Court's decisions on physical takings are restricted to real property devoted to personal use. The leading case, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), involved a residential rental building. The case of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) involved the development of a seaside marina for the benefit of thousands of homeowners adjacent to the bay.

Moreover, the Coalition and the municipal petitioners (hereinafter the "City") also incorrectly assert that the Local Law No. 9 is not a taking because it is not "permanent". First, this Court has found non-permanent occupations of property to be a "taking". Second, since any new occupant will be protected

under the local rent stabilization laws, the new occupant will be protected from eviction long after any expiration of Local Law No. 9. Additionally, pursuant to the stabilization laws, the occupant can "pass on" the right of continued occupancy to family members.

Finally, the Coalition and the City are incorrect in asserting that Local Law No. 9 is similar to other "rent regulatory laws" found valid by this Court. Local Law No. 9, unlike any "landlord-tenant" law ever presented before this Court, creates an affirmative obligation by the owner to rent property. In all other cases before this Court, the issue was the validity of laws that affected an existing landlord-tenant relationship.

The New York State Court of Appeals also correctly found that Local Law No. 9 constituted a "regulatory taking". Sutton East respectfully adopts the arguments asserted by its co-respondents in this regard. However, Sutton East adds that the hardship provision under Local Law No. 9 is not, contrary to the assertions of the Coalition and the City, similar to the hardship provision under the New York City Rent Control Law. This is because under the Rent Control Law, there is a hardship if an owner cannot make a net annual return of 8-1/2% of the equalized assessed value.[2] Under Local Law No.

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[2] "Assessed value" is the value of a parcel of real estate given to it by a local assessor. That value is the sum for which each separately assessed parcel of real estate would sell under ordinary circumstances if it were wholly unimproved; and separately stated, the sum for which the same parcel would sell under ordinary circumstances with the improvements, if any, thereon. N.Y. Real Prop. Tax § 522 (McKinney 1984)

"Equalized assessed value" is the value derived by a formula by which the assessed value is multiplied in order to create uniformity throughout the

9, the hardship standard is 8 - 1/2% of assessed value, assessed as a SRO. The standard under Local Law No. 9 uses an artificially depressed standard which makes it, on its face, virtually impossible for any owner to apply.

counties. Equalized assessed value is ascertained by multiplying the assessed value of the property by the state equalization rates which are the percentage of the full value at which the taxable real property in the municipality has been assessed. N. Y. Real Prop. Tax § 804 (McKinney 1984).

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION BECAUSE OF THE UNIQUE NEW YORK STATE INTERESTS INVOLVED

As noted in the Summary of Argument, there are two New York State interests involved which preclude this Court from taking jurisdiction over this case. First, the decision of the New York State Court of Appeals rested upon an independent and adequate state ground, namely the New York State Constitution. Second, the New York Court of Appeals found that Local Law No. 9 did not substantially advance a legitimate state interest. This is a unique state determination to which this Court should defer.

A. The Independent and Adequate State Ground

This Court has long relied upon:

> ". . . the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

Tribe, American Constitutional Law (2nd Ed. 1988) at Section 3-24, p. 163, citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court reviewed the principles under which it will determine whether a

state court decision is based upon independent and adequate state grounds, thereby precluding Supreme Court review. The Court held that:

> "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached. In this way, both justice and administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Id. at 1041

The New York State Court of Appeals clearly stated that its decision was based on "bona fide, separate, adequate and independent grounds" from an interpretation of the Federal Constitution. *See, e.g.,* Decision at (A. 635 fnt. 15).

Although the New York State Court of Appeals referred to several decisions of this Court, the New York State Court merely relied on those precedents "as it would on the precedents of all other jurisdictions." *Michigan v. Long, supra* at 1041.

Significantly, nowhere in the decision of the New York State Court did it state or imply that the takings clause of the New York State Constitution must be interpreted in the same

manner as the takings clause of the Federal Constitution. Indeed, in footnote 15 at page 27 of the Decision, the New York State Court specifically recognized that the two Constitutions could be interpreted differently on this issue. The New York State Court merely found, however, that the two Constitutions were the same on this specific issue. Thus, the New York State Court did:

> "... not [need to] decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution."

Id.

Since the decision of the New York State Court is based upon an independent and adequate non-federal ground, this Court has no jurisdiction.

B. THE DETERMINATION OF STATE INTERESTS

All of the petitioners acknowledge that, under this Court's decisions involving "regulatory" takings, a statute "does not affect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Citing, *Nollan v. California Coastal Commission*, 483 U.S.2d 825, 834 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987). Thus, a statute must meet both tests in order to not constitute a regulatory taking.

The New York State Court of Appeals found that Local Law No. 9 did not substantially advance a legitimate state interest. (A. 44)

No one - - including the New York State Court of Appeals, Sutton East and the other respondents - - disputes that "the end sought to be furthered by Local Law No. 9 is of the greatest societal importance - - alleviating the critical problems of homelessness." *Id.*

However, the New York State Court of Appeals determined that the means established by the local law did not advance that interest. (A. 44 - 45)

The determination by New York State's highest court regarding the nexus between the means and end is a unique state law determination to which, upon a negative finding, this Court must defer.

POINT II

LOCAL LAW NO. 9 IS A "PHYSICAL TAKING" OF PROPERTY WITHOUT JUST COMPENSATION

Local Law No. 9 is a "physical" taking because it requires Sutton East to permit third-party strangers to physically intrude upon and occupy its vacant building. Local Law No. 9 imposes an affirmative, mandatory duty to rent. Thus, Sutton East is required to allow strangers, who have no present legal or possessory interest, to physically intrude onto its vacant property and requires Sutton East to be in a business it is not in and does not want to be in.

This affirmative, mandatory directive to rent to third-party strangers is an unconsented to physical intrusion, by government direction, onto a person's property.

The New York State Court of Appeals concluded:

> "Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.
>
> Under the traditional conception of property, the most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying or using the space." (citations omitted)

(A. 16)

This Court has consistently held that such physical intrusions onto a person's property is a "taking" which must be compensated under the Fifth Amendment to the United States Constitution.

The bright line test established by this Court is simple: where there is an invasion and occupation of private property, there has been a compensable taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the owner of a residential apartment building was required by state law to allow a cable television company to install cable across the property. Although this Court characterized the intrusion as "minor," (*Id.* at 421), the Court held that the intrusion did constitute a physical occupation of property and thus constituted a taking.

In *Loretto*, this Court stated that:

> "... we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."

Id. at 426.

This Court further stated that:

> "Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. ... property law has long protected an owner's expectation that he will be relatively undisturbed at least in

> the possession of his property." (emphasis in original)

Id. at 436.

In *Nollan v. California Coastal Commission, supra*, the issue was whether a local government could condition the grant of a building permit upon the owner of beach front property agreeing to permit the public to traverse it in order to reach a public beach. This Court, utilizing a "regulatory taking" analysis, ruled that the government could not so condition the grant of a permit. However, before reaching that issue, this Court noted that:

> "Had California simply required the Nollans to make an easement across their beach front available to the public on a permanent basis in order to increase public access to the beach... we have no doubt that there would have been a taking."

107 S. Ct. at 3145

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court found that the government's requirement that a real estate developer give public access to a private pond and marina would "result in an actual physical invasion of the privately owned marina." *Id.* at 176. The Court reasoned that to take away the right to exclude is to take away "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 444 U.S. at 180.

Consistent with these decisions, the New York State Court of Appeals found that Local Law No. 9 was a physical "taking." The Court concluded that:

> "Indeed, it is difficult to see how such forced occupancy of one's property could not [constitute a *per se* physical taking]. By any ordinary standard, such interference with an owner's rights to possession and exclusion is far more offensive and invasive than the easements in *Kaiser Aetna* or *Nollan* or the installation of the CATV equipment in *Loretto*." (Citations omitted.)

(A. 21 - 22)

Petitioners incorrectly allege that Local Law No. 9 is no different than other laws which regulate landlord-tenant relationships. In support of this allegation petitioners cite to such cases as *Pennell v. City of San Jose*, 485 U.S. 1 (1988) *Bowels v. Willingham*, 321 U.S. 503 (1944) *Block v. Hirsh*, 256 U.S. 135 (1921), *Callahan v. Fresh Pond Shopping Center Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, and *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), appeal dismissed, 449 U.S. 1119 (1981), 464 U.S. 875 (1983).

However, petitioners fail to focus on the crucial difference which distinguishes these cases: that is, Local Law No. 9 does not regulate an existing landlord-tenant relationship. Instead, it forces the creation of an unwanted landlord-tenant relationship. Regulating an existing relationship which the landlord initially consented to is quite different from foisting upon an owner an unwanted relationship.

The argument advanced by petitioners was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*:

> "In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mail boxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." (Emphasis added)

458 U.S. at 440.

The New York State Court of Appeals accepted this Court's analysis in so ruling:

> "Those decisions have no bearing on the questions here - - whether forcing plaintiffs to rent their properties to strangers constitutes a physical taking...
>
> The rent control and other landlord-tenant regulations that have been upheld by the Supreme Court and this Court merely involve restrictions imposing upon existing tenancies where the landlords had voluntarily put their properties to use for residential housing.

> Unlike Local Law No. 9, however, those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired."

Petitioners, also incorrectly argue that the Court of Appeals' application of the doctrine of physical takings to Local Law No. 9 was unwarranted because Local Law No. 9 purportedly is not permanent. (City's Petition at 13; Coalition Petition at 4 - 5.)

Petitioners fail to acknowledge that, although Local Law No. 9 provides that it may be renewed for five year periods if the New York City Council determines that the emergency which the law purportedly addresses still continues. There is no likelihood that the emergency (housing in New York City) will end in the foreseeable future. The housing emergency in New York has continued since the end of World War II - - more than forty years ago - - and continues today. (Act of March 30, 1946, Ch. 274, 1946 N.Y. Laws 723; Local Emergency Housing Rent Control Act, Ch. 21, 1962 N.Y. Laws 51; Emergency Housing Rent Control-Extension, Ch. 480, 1969 N.Y. Laws 754; Emergency Tenant Protection Act of 1974, Ch. 576, N.Y. Laws 769, Local Law 16 of 1969, Local Law 18 of 1988.)

Thus, it is likely that the "emergency" that is the basis of Local Law No. 9 will last indefinitely. Indeed, the New York State Court of Appeals so found:

> ". . . while not specifically made permanent, Local Law No. 9 is, by its own terms, to remain in effect

> indefinitely since its five year terms may be extended for additional terms without limit....

(A. 27 - 38, fnt. 5)

Further, Local Law No. 9 will adversely affect Sutton East's property long after any theoretical nonrenewal. The occupancy of any new tenant at Sutton East's vacant building will be governed by New York's rent stabilization laws. Those laws effectively permit any tenant to occupy Sutton East's property indefinitely (except for certain narrowly defined and applied circumstances). Rent Stabilization Code § § 2523.5-2524 (codified at N.Y.C.R.R. Tit. 9, Sub. S, Ch. VIII), published separately in McKinney's, Unconsolidated Laws.

Moreover, a tenant may "pass on" the right to occupy his unit to a new tenant under the "Law of Succession" created under the State Regulations. *See*, 9 N.Y.C.R.R. § 2523.5.

Even if the offending law is "temporary," it still constitutes a taking for that limited period of time.

The New York State Court of Appeals stated that:

> "... (2) even if Local Law be viewed as a temporary provision, it results in a deprivation of the owner's quintessential rights to possess and exclude and therefore, amounts to a physical taking. Under *First Lutheran Church*, ..., where, as here, the governmental action resulted in a *per se* taking, the offending action constitutes a taking for whatever time period is in effect."

(A. 28, fnt. 5)

Petitioners allege that the Court of Appeals mistakenly interpreted this Court's decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 109 S. Ct. 2378 (1987) as holding that physical takings could be temporary (City's Petition at 13).

The fact that a physical taking could be temporary was already clearly decided by the time *First English Evangelical Lutheran Church, supra*, was decided. In fact, in *First English Evangelical Lutheran Church, supra*, this Court relied on such cases as *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) and *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Each of these cases involved appropriation of private property by the United States for use during World War II. All of these cases unequivocally involved physical takings. Additionally, all of these takings were in fact "temporary." Nonetheless, this Court held that there were takings for which compensation had to be paid.

> "Though the takings were in fact 'temporary' [citation omitted] there was no question that compensation would be required for the government's interference with the use of property . . ."

107 Sup. Ct. at 2387.

In *First English Evangelical Lutheran Church, supra*, this Court found that there is no constitutional difference between a "temporary physical occupation" for which

compensation must be paid and a "permanent physical occupation:"

> "These cases reflect the fact that 'temporary' takings which, as here, deny a land owner all use of his property, are not different in kind from permanent takings, for which the constitution clearly requires compensation." (citations omitted)

107 Sup. Ct. at 2388

Petitioners also allege that Local Law No. 9 does not constitute a physical taking because there is no physical occupation of property. (City's Petition at 14). The mandatory requirement in Local Law No. 9 that an owner allow a third-party stranger to come on to his property and take up habitation is clearly an act of physical occupation. As stated by the Court of Appeals:

> "The Law [Local Law No. 9] requires nothing less of the owners than 'to suffer the physical occupation of [their] building[s] by third part[ies].'" (citations omitted)

(A. 28 - 29)

This Court has <u>not</u> held, as asserted by the Coalition, that physical takings are restricted to those laws which effect personal privacy: that is, the property must be devoted to personal use.

The leading case of *Loretto v. Teleprompter Manhattan CATV Corp., supra*, involved "a five story apartment building." 458 U.S. at 421. The physical occupation there was a small

cable which provided cable television services "to the tenants." *Id.* at 421 - 22. There is no indication that the plaintiff in *Loretto* even occupied any portion of the building at issue.

Kaiser Aetna v. United States, *supra*, involved a large marina development. The development, which included a large pond, was 6,000 acres. The developer had dredged and filled parts of the pond, erected retaining walls and built bridges within the development to create a marina and increased the depth of the channel so as to accommodate pleasure boats. At the time of trial, the community contained approximately 22,000 persons, 1,500 marina water front lot lessees, 86 nonmarina lot lessees, and 56 nonresident boat owners. *Id.* at 167 - 168.

Certainly, there were no "personal privacy" interests involved in *Kaiser Aetna* as asserted by the Coalition. Nonetheless, this Court found there to be a taking.

Furthermore, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980), are not at all relevant to the issue before the Court in this case.

In *Heart of Atlanta*, *supra*, the issue was whether the government could require a place of public accommodation to not discriminate. *Pruneyard Shopping Center v. Robbins*, *supra*, involved the issue of whether a shopping center, which had in effect become the "City Square" could prevent its invitees from exercising their First Amendment rights to free speech.

Unlike the Motel in *Heart of Atlanta* and unlike the shopping center in *Pruneyard Shopping Center*, Sutton East's

property is not a place of public accommodation. Rather, it is a private, vacant building.

The "buyout" and replacement provisions of Local Law No. 9 do not cure the taking caused by the law, contrary to the assertion of petitioners.

The argument that a law is not a taking because an owner can "buy out" of it, turns the law of takings on its head. When there is a taking, the government must provide just compensation to the owner, not the other way around. (United States Constitution, Amendment V).

If Sutton East wanted to "buy out" of Local Law No. 9, it would have to pay $ 1,395,000.00 for the 31 units at its hotel. Requiring a property owner to "buyout" of the law "adds insult to injury" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 436) to the taking committed by the government.

Thus, Local Law No. 9 is a physical taking of property.

POINT III

LOCAL LAW NO. 9 IS A REGULATORY TAKING

In order to avoid needless repetition, Sutton East adopts as its own the arguments advanced by co-respondents regarding the regulatory takings analysis.

Sutton East, however, wishes to show that the hardship provision of Local Law No. 9 does not cure the "regulatory takings" caused by Local Law No. 9.

The Court of Appeals held that even if Local Law No. 9 did not effect a physical taking, it would be facially invalid as a regulatory taking. The Court recognized that government regulation involves the adjustment of rights for the public good and that often such adjustment impairs some potential for the use or economic exploitation of private property.

However, the Court of Appeals recognized that some adjustments of rights may be too excessive. Specifically, the Court held that:

> "... the constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (citations omitted)

(A. 29 - 30)

The Court of Appeals utilized the *Nollan* test in order to determine whether Local Law No. 9 constituted a regulatory taking. The *Nollan* test provides that a regulation of the use of private property will, without more, constitute a taking if:

> (1) Either it denies an owner economically viable use of his property,
>
> or
>
> (2) If it does not substantially advance legitimate State interests.

(A. 30 - 31)

Satisfaction of either requirement is sufficient to invalidate a regulation. The Court of Appeals in applying the *Nollan* test to Local Law No. 9 held that "Local Law. No. 9 fails on both counts." (A. 31 - 32)

Petitioners claim that the hardship provision saves Local Law No. 9 because it was copied from the hardship provision of the rent control laws and those laws have been declared to be constitutional. (City's Petition at 15) However, such is not the case. The SRO hardship provision is entirely different from the rent control hardship provision.

Local Law No. 9 provides for a hardship if an owner cannot make a net annual return of 8 1/2% of the assessed value of the property disregarding any increase in the assessed value resulting from a sale if New York City Department of Housing Preservation determines that the amount paid for the property was in excess of the fair market value of the property

used for SRO purposes. (New York City Administrative Code § 27-198.2(d)(4)(b).)

Under the hardship provision of the rent control regulations (9 N.Y.C.R.R. § 2202.8), an owner can receive an increase in rent if he cannot make an 8 1/2% return on the equalized assessed value. (Section 2202.8(a)(4).)

The difference between the rent control regulations and Local Law No. 9 is that the assessed value of a property as a SRO is significantly lower than the equalized assessed value of that same property.

Thus, where it would be very difficult to make a net annual return of 8 1/2% of the equalized assessed value of a property, it would be almost impossible not to make a net annual return of 8 1/2% of the assessed value of a property as a SRO.

The assessed value of Sutton East's property before its purchase was $ 165,000. The City undoubtedly will use that assessment as its base for determining whether there is a hardship. (Sutton East disputes that this is the proper base but assumes it for the sake of argument here.) Thus, in order to qualify for a hardship under Local Law No. 9, Sutton East must make a net return of no more than a mere $ 14,025 (that is, 8 1/2% of $ 165,000).

However, the current assessed value of the property (based on the 1988-89 assessment) is $ 600,000. Utilizing the 1988-89 tentative City-wide equalization rate (32.49), the equalized assessed value is $ 1,842,000. Sutton East must earn

net, more than $ 156,570 (8 1/2% of the equalized assessed value) before it qualifies for a hardship increase under the rent control regulations.

Thus, as a practical matter, the rent control hardship is more than 10 times the amount of the hardship under Local Law No. 9.

This difference between the two hardship provisions is evident from the chart below:

	SRO Moratorium (Assessed Value as an SRO)	Rent Control (Equalized Assessed Value)
Valuation	$ 165,000	$ 600,000 ($600,000 ÷ .3249 [equalization rate]) = $ 1,842.000
8 1/2% of Valuation	$ 14,025	$ 156,570

Clearly the two are not the same.

By not using the current equalized assessment, the SRO Moratorium hardship effectively permits only a 2% return on assessed value ($ 14,025 return on $ 600,000 assessed value) and less than a 1% return on full equalized value.

Such low returns are no returns and are confiscatory.

In recognition of the multiplicity of briefs to be submitted, Sutton East will not further burden this Court by reiterating those arguments with respect to Local Law No. 9 being unconstitutional as a regulatory taking but instead incorporates those arguments as its own.

CONCLUSION

THE PETITIONS FOR WRITS OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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